situations in which the argument might be credited. Id. at 5170 ¶35. The NPRM's proposal would enhance the impact of past unlawful residential segregation on today's job market by allowing minorities to become exposed to relatively fewer notices of job openings than Whites -- solely because of residential segregation.327/ This disproportion in opportunity will become

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327/ See U.S. v. Yonkers Board of Education, 624 F.Supp. 1276, 1533 (S.D.N.Y. 1985) (school desegregation relief ordered where "some meaningful connection exists between the policies of public housing officials and the policies of school board officials"); cf. U.S. ex rel. Golsby v. Harpole, 263 F.2d 71 (5th Cir.), cert denied, 361 U.S. 850 (1959) (where Blacks had been systematically denied the opportunity to register to vote, Blacks were thereby systematically excluded from the jury service for which voter registration was a predicate).

Exclusion of central city residents from recruitment efforts by suburban stations, while suburbanites are included in the recruitment efforts of both central city and suburban stations, means that minorities will receive relatively fewer notices of job opportunities on a marketwide basis. For example, in the Miami/Ft. Lauderdale radio market provides a good example. That market consists of two PMSAs, Miami-Hialeah (69.7% minority) and Ft. Lauderdale-Hollywood-Pompano Beach (25.1% minority). Miami and Ft. Lauderdale are 27 miles apart. Twenty-four radio stations in the Miami PMSA, with 637 fulltime jobs, reported Form 395 EEO data in 1995, while thirteen Ft. Lauderdale PMSA radio stations, with 174 fulltime jobs, reported Form 395 EEO data in 1995. If Ft. Lauderdale PMSA stations were not required to recruit in the Miami PMSA, the average number of jobs available to Whites in the region would be 743, while the average number available to minorities in the region would be 670. This means that minorities would have access to 9.8% fewer jobs than Whites -- a significant "tax on Blackness or Brownness" owing to the much higher proportion of minorities in Miami than in Ft. Lauderdale. Comparable or greater disproportions in opportunity would also exist between any major, predominately minority city and its outlying suburbs.

worse, given the current trend of White flight into the exurbs.[328/]

The Commission's three-part test for determining the appropriateness of a suburban station workforce waiver is excellent and should be retained.[329/] Furthermore, stations making a patently irrational reverse-commuting argument should be scrutinized carefully to determine whether the argument is a pretext for discrimination.

328/ See Ann O'Hanlon, "Two-Way Commuting Couples Blur Line Between D.C., Richmond," The Washington Post, July 21, 1996, p. B-2 (describing the "growing number of commuters straddling the once-distinct metropolitan areas of Washington and Richmond, blurring the line between the two and bringing rapid change to the land between.") See also Joel Kotkin, "White Flight to the Fringes," The Washington Post, March 10, 1996, p. C-1: "As middle-class, predominately white Americans detach themselves from the multi-colored realities of urban metropolitan regions - moving not just to the suburbs but far beyond - the gap between the cities and the world beyond could grow ever greater." Kotkin quotes John Kasarda, Director of the Kenan Institute of Private Enterprise at the University of North Carolina: "It's not just the old move to the suburbs, it's the exurbs and beyond. It is a move to remove as far as possible from the inner-city poor areas. It's both avoidance and flight." Id. at C-2. Kotkin also quotes Brad Bertoch, President of the Wayne Brown Institute, which is dedicated to developing Utah's high-tech industries: "One thing people don't want to worry about is race relations. Companies think if they go to a neighborhood where everyone is like me, it makes it easier. It takes away from stress. People want to remove some of the variables of their lives." Id. Kotkin concludes that "current migration patterns virtually guarantee a growing racial and cultural clash between the cosmopolitan cities and the Valhallan hinterland on a scale not seen since the divisions that led to the Civil War."

329/ See Broadcast EEO - 1987, 2 FCC Rcd at 3973 ¶41 (the three factors are the distance of the station from areas with significant minority population in the MSA, commuting difficulties, and the lack of success of previous recrutiment efforts).

c. Claims that minorities or women require higher pay than White males

Some broadcasters claim that it is difficult to hire minorities or women because they won't accept lower paying positions. It is surely a surprise to learn that minorities and women, now or at any time in our history, have become accustomed to making more money than White males for the same work.330/

The Commission has made it plain that salary limitations "affect minorities and nonminorities equally." Lotus Communications, Inc., 9 FCC Rcd 2117, 2120 n. 13 (1994). In the future, the Commission should consider the argument that minorities or women must have higher pay -- which is absurd on its face -- to be a pretext for possible discrimination.

330/ See Testimony of Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Before the Subcommittee on Employer-Employee Relations, Committee on Economic and Educational Opportunities, United States House of Representatives, March 24, 1995, at 4 (pointing out that in 1993, "the median income of African Americans was barely more than one-half that of whites.")

d. Claims that minorities or women prefer other occupations besides broadcasting

On occasion, broadcasters have argued that minorities or women prefer to work in jobs in manufacturing, agriculture, or marketing rather than in broadcasting.[331/] In almost no case has a broadcaster documented this claim.

Hiring across industries (especially in sales) is very common. No one has ever made the argument that it is difficult to recruit White males into broadcast employment because they are overrepresented in banking, insurance, finance, law, medicine or government.

At best, the argument that minorities can't be recruited into the broadcasting industry is a self-fulfilling prophecy. At worst, it is a pretext for discrimination.

331/ See, e.g., Sandab Communications Limited Partnership II, FCC 96-305 (released July 22, 1996) (reconsideration pending) ("Sandab") (discussing licensee's purpose in contending that minorities are disproportionately employed in agriculture). A copy of these Comments are being served on the renewal applicant in Sandab.

e. Claims by medium market stations that minorities or women eventually leave for larger markets

Medium market broadcasters commonly argue that it is difficult to retain minorities or women because they eventually leave for larger markets. This argument disregards a fact well known by every medium market broadcaster: its employees are drawn from even smaller markets. Furthermore, the career ladder from small to large market, and from small to large station, is climbed by both genders and all races in the same way. Thus, the argument that minorities and women cannot be retained reeks of pretext, and should give rise to an inference of possible discrimination.

f. Claims that women make poor employees because they marry or get pregnant

The contention that women make poor employees or are harder to retain because, e.g., they marry, become pregnant, or have children is an obvious signal of discriminatory intent. See, e.g., KEZE Radio, 44 RR2d 1527 (1978) ("[y]our explanation for the station's difficulty in retaining female employees is not entirely satisfactory. Men do not experience pregnancy; however, they also marry, divorce and have 'other personal problems.'")[332/] Statements like these should always be treated as a pretext for discrimination.

332/ See also Haynes v. W.C. Caye & Co., 52 F.3d 928 (11th Cir. 1995) (claim that women were not "tough enough" to handle debt collection was held to be direct evidence of sex discrimination.

g. Customer Preference Discrimination

Perhaps the most troubling argument a broadcaster can make to defend its failure to hire minorities and women is one which embeds the assumption that members of its audience, or its advertisers, prefer the station to employ White males, or do not prefer the station to employ persons with attributes (e.g. a subjective voice quality or accent in an announcer)[333/] which are thought to be disproprotionately present among minorities and women.[334/]

Another permutation of this argument embeds the suggestion that minorities or women lack "experience" selling a particular type of spot or format. See Lutheran (HDO), 9 FCC Rcd at 924; see pp. 260-261 supra.

333/ Voice quality is so subjective that the risk of discriminatory application of a voice quality standard is very high. The EEOC is highly troubled by contentions that speech patterns hinder job ability. See EEOC Dec. No. 79-16, 26 FEP Cases 1764, 1965 (1978) (Iranian applicant for job as librarian showed that ability to speak English clearly was not necessary for successful job performance).

It is fascinating that the leading case, Chaline v. KCOH, Inc., 693 F.2d 477 (5th Cir. 1982) ("Chaline") involved a White male production manager with announcing experience who was laid off when the Black-oriented radio station at which he worked downsized. The station had never had a White announcer. Id. at 478. The company's defense to Chaline's race discrimination suit was a claim that "he does not have the proper 'voice' to serve as a disc jockey on a black-oriented radio station [and] is not sensitive to the listening tastes of a black audience." Upholding the trial judge, the appellate court found that "such a subjective job qualification provides a 'ready mechanism for racial discrimination'", citing Johnson v. Uncle Ben's, Inc., 628 F.2d 419, 426 (5th Cir. 1980). Chaline, 693 F.2d at 481. Chaline proved that he had used a "Black" voice before in preparing commercials, and "the record reflects that he demonstrated his mastery of the voice and idiom during the course of trial." Id. at 482.

334/ Worse yet would be a case in which a station conducts an audience survey to help it develop the appropriate "sound" but instructs interviewers not to ask substantive questions of Black respondents. Such a case is pending before the Commission now. A copy of these Comments is being served on that licensee's counsel.

These arguments are little more than thinly disguised customer preference discrimination. See Diaz, 442 F.2d at 386 (holding that flight attendant positions may not be restricted to women simply because male business travelers prefer to be waited on by female attendants).335/

Business necessity claims based on highly subjective criteria are inherently suspect, for they often "discriminate in fact under a facade of apparent neutrality." Rogers v. International Paper Co., 510 F.2d 1340, 1345, rehearing denied, 510 F.2d 1357 (8th Cir. 1975). Examination of the goals underlying subjective selection criteria "might reveal underlying personal biases or discriminatory stereotype[d] classifications." Id. at 1346.

335/ In these cases, more than a mere "business purpose" is required: an employee must have a "compelling business necessity" for a discriminatory practice. U.S. v. St. Louis-San Francisco Ry. Co. 464 F.2d 301 (8th Cir. 1972) (en banc). The licensee would carry a heavy burden of proof that the requirement is job-related, having a "manifest relationship to the employment in question," Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). If "an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited" and an alternative, nondiscriminatory practice must be used instead. Id. at 431-32. The EEOC deems an employer to be discriminating when it has failed to determine whether "suitable alternative selection procedures and suitable alternative methods" of selection could have been employed. Uniform Guidelines on Employee Selection Procedures, 29 CFR §1607.3(B).

The FCC has always been suspicious of licensees' racially tainted claims of "suitability" for certain positions. See Rust (HDO), 53 FCC2d at 363 (rejecting applicant's "apparent classification of only some positions as 'suitable' or 'feasible' for minority applicants").

We expect to see more of these subjective claims in the future, whether stated explicitly or applied in fact. The job consolidation attendant to superduopolization in local markets has begun to force some minority-format stations to market themselves so as to reach wider audiences. Rather than assume that these stations' predominately minority staffs are capable of reprogramming their own radio station, some group owners have begun to purge the minorities.336/

The open or implied use of customer's presumed preferences as a surrogate for race or gender-skewed employee selection or work assignments is inherently discriminatory and must be examined in hearing.

336/ We have seen this before. When many school districts were desegregated, school boards assumed, without proof or any basis in fact, that Black teachers could not teach White pupils and that Black administrators could not supervise White teachers. Thus, the courts have held that teachers displaced when a formerly segregated Black school is closed "must be judged for continued employment by definite objective standards with all other teachers in the system." Rolfe v. Lincoln County, Tennessee Board of Education, 391 F.2d 77, 80 (6th Cir. 1968); see also North Carolina Teachers Association v. Asheboro City Board of Education, 393 F.2d 736, 744 (4th Cir. 1968); Stell v. Savannah Board of Education, 387 F.2d 486, 497 (5th Cir. 1967).

10. The use of excuses which trivialize EEO compliance

The arguments discussed at pp. 257-270 supra (e.g. format, reverse commuting, customer preferences) are so clearly discriminatory that it should be the rare case that a station advancing these arguments is not set for hearing. The arguments discussed in pp. 271-280 herein will also be made individiously in many cases, but are sometimes made innocently. It is possible that a broadcaster could advance the claims in this section out of ignorance, insensitivity or thoughtlessness. Whatever the broadcaster's motivation, however, the Commission should make it clear that these excuses for EEO noncompliance are unacceptable, and that in appropriate cases, the Commission may draw an inference of discriminatory intent.

a. Undocumented or irrational claims that few minorities or women are "qualified"

The claim that minorities or women are generally not "qualified" for broadcast employment almost never arrives at the Commission with any documentation.337/ It is usually little more than a stereotype. A claim, explicit or implicit, that Blacks would have been hired if only they'd been qualified "must be given close scrutiny" where an employer has an "extremely nominal percentage of Black employees within the [relevant] department[.]" U.S. v. N.L. Industries, 479 F.2d 354, 367, rehearing en banc denied, 479 F.2d 382 (8th Cir. 1973).

337/ In Beaumont, 854 F.2d at 508, the licensee claimed that most Blacks were not qualified for radio jobs in its area, and it could not outbid competitors because of its financial position. But the Court found that "[n]owhere in the record is either assertion corroborated, and the Commission appears to have made no independent attempt to do so."

This claim frequently arises through arguments that the appropriate workforce for comparison with broadcast station employment is not the community at large, but instead is a much smaller class of persons who have specialized skills. This argument seldom has any merit. In 1980, the Commission explained:

> there are certain highly specialized areas of broadcast industry employment in which few women and minorities have as yet acquired the requisite professional skills. This is the case particularly as to college graduate electronic engineers. The Commission will, in its in-depth reviews, take cognizance of a licensee's inability to employ women or minorities in positions for which the licensee documents that only a very limited number of women or minority group members have the requisite skills. The licensee should show in its EEO program that the skills are in fact required, and provide Census or similar data indicating that, as to women or minorities, individuals possessing these skills are as yet in short supply. Evidence of efforts at recruitment should also be presented. The Commission expects that the cases in which such a showing can properly be made will be few" (emphasis supplied).

EEO Processing Guidelines, 79 FCC2d 922, 932 (1980) (emphasis supplied).[338/] The reason minorities and women are seldom employed by stations which believe them "unqualified" is that these stations haven't given them a chance.[339/]

338/ See Radio Dinuba Company, FCC 96-234 (released July 25, 1996), at 5 ¶14 (rejecting argument that "many persons in the area do not speak English and many do not have even a high school education"); see also Golden West Broadcasters, 10 FCC Rcd 1602, 1604 n. 11 (1995) and San Luis Obispo Limited Partnership, 9 FCC Rcd 894, 904 n. 23 (1994) (to the same effect).

339/ Indeed, a licensee's sudden increase in minority employment, after it has claimed that such hiring was impossible, may stand as evidence that the original claims had no merit. See NBMC, 775 F.2d at 358 (Concurring Opinion of Judge Kenneth Starr) (noting that "once WYEN at long last undertook a vigorous recruitment effort, the number of minority employees at the station took a significant turn upward").

b. Claims that the area's unemployment rate is low

Claims that the unemployment rate is particularly low are sometimes made to attempt to show that it is more difficult to hire minorities or women. However, this factor will usually make it relatively easier to hire minorities and women -- whose unemployment rate is usually well above the unemployment rate for White males.

In our experience, broadcasters who make this argument in isolation from other arguments are simply being thoughtless. However, when made in connection with other, clearly pretextual arguments, this argument too might be read as flowing from the same tainted motives.

c. Claims that compliance is difficult because of the licensee's financial condition

As we have shown, the cost of EEO compliance is almost nothing: everyone can afford postage, phone calls, faxes or e-mail and file storage of documents which have to be maintained anyway. See pp. 103-106 supra.

In our experience, when this argument is made in isolation, the licensee is simply feeling sorry for itself and is usually not a discriminator. But when made in connection with other questionable, pretextual claims, this argument should often be read as additional evidence of intentional discrimination.

d. Blaming noncompliance on subordinates

The urge to pass on blame is human: it may reflect cowardice rather than an intent to discriminate. But the Commission should remind licensees that they are ultimately responsible for choosing and supervising their subordinates. Trustees of the University of Pennsylvania, 69 FCC2d 1394 (1978). Well established rules of agency make a subordinate's actions the licensee's actions. See, e.g., King v. Horizon Corp., 701 F.2d 1313, 1318-19 (10th Cir. 1983); Thomas v. Colorado Trust Deed Funds, Inc., 366 F.2d 140, 143 (10th Cir. 1966). The Commission should not accept the excuse that failure to recruit, failure to keep records, or failure to maintain an effective EEO program was the fault of a rogue manager -- a "dog who ate my homework." As an expert agency, it knows that absentee station owners seldom leave regulatory policy matters as important as EEO entirely to the unsupervised autonomy of their local managers. Broadcasters which leave EEO matters to the discretion of local managers still are charged with ultimate responsibility for those managers' performance. Cf. RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981) ("RKO") (rejecting, inter alia, attempts by licensee to blame misconduct on subordinates).340/

340/ Some mitigating weight may be given to claims that subordinates were responsible for EEO violations if the licensee took immediate and dramatic action as soon as he learned that his instructions had not been carried out. See TelePrompTer Cable Systems, Inc., 40 FCC2d 1027 (1973) (after misconduct surfaced, a new board of directors was elected as expeditiously as possible. The new board initiated a special study to inform it on how to prevent recurrences, and management began a housecleaning to purge itself of past misconduct).

e. Claims that EEO records were lost or were never maintained

The Commission should exercise great care before it forgives a licensee whose defense to an EEO complaint is that it lost or forgot to maintain its records. On occasion, this facile, serendipitious claim has been little more than thinly veiled fraud, propounded in the hope that the absence of written documentation will discourage the Commission from pursuing the matter to its rightful conclusion. Sometimes it apparently works.341/

At a minimum, the Commission should interview those with personal knowledge and reconstruct the missing records. When this defense is combined with other, pretextual arguments, the Commission should consider whether the nonmaintenance of records is itself a deliberate effort to conceal discrimination.342/

341/ See, e.g., CRB of Florida, Inc., 6 FCC Rcd 2303, 2304 ¶¶10-11 (1991) (licensee reported no minority hires or referrals for 16 vacancies, and it maintained no records, but its license was renewed with a $7,500 forfeiture); Sarasota Renewals, 5 FCC Rcd 5683, 5685-86 ¶¶22-25 (1990) (licensee did not know the referral sources for eighteen employees out of 27, and didn't know the number of minority interviewees for 25 of the 27 positions, but its license was renewed with only a $2,000 forfeiture).

342/ The Commission may draw an adverse inference from the failure to maintain records. The Uniform Guidelines on Employee Selection Procedures, at 29 CFR §1607.4, mandate that employers must retain sufficient records "which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group...in order to determine compliance with these guidelines." The Uniform Guidelines also provide that "[w]here the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may drawn an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market...." 29 CFR §1307.4(D). Failure to keep appropriate records may constitute "spoilation" -- especially if maintenance of the records is mandated. See Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 843 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978).

f. Dumping compliance efforts into the last few months of the renewal term

Compliance efforts beginning after a petition to deny is filed do not illuminate EEO performance before that time, nor do they serve to predict future EEO performance in the absence of scrutiny. NBMC, 775 F.2d at 342.[343/] After NBMC, many broadcasters simply began preparing for renewal a few months earlier. Consequently, we have seen many instances of EEO performance which began a few months before renewal time -- too early to directly implicate NBMC; too late to be meaningful.[344/]

To avoid evasion of the underlying principle of NBMC, the Commission should afford EEO performance in the last year of a license term little weight if it was not preceded by several years of substantial compliance.

343/ It is well established that performance while under intense regulatory scrutiny is nonpredictive of future compliance. See, e.g. Gonzales v. Police Dpt., 901 F.2d 758, 761-62 (9th Cir. 1990) (citations omitted) (fact that minority employees were "promoted just before trial...does not constitute a defense to plaintiffs' charges, nor does it moot the issues....research leads us to conclude that often the acts relied upon as evidencing good faith are taken in response to the lawsuit filed by the discriminatee. Such actions in the face of litigation are equivocal in purpose, motive and permanence"); Craik, 731 F.2d at 478 (post-suit evidence not entitled to the same weight as pre-suit evidence); Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968) ("[s]uch a last minute change of heart is suspect, to say the least"); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n., 375 F.2d 648, 658 (4th Cir. 1967) ("[p]rotestations of repentance and reform timed to anticipate or blunt the force of a lawsuit offer insufficient assurance that the practices sought to be enjoined will not be repeated"); Stender v. Lucky Stores, 57 FEP 1431 (N.D. Cal. 1991) (summary judgment denied in part because company's performance in relevant time frame may have been "litigation driven").

344/ See, e.g., Louisiana Renewals, 7 FCC Rcd 1503, 1508 ¶38 (1992), recon. denied, 8 FCC Rcd 3239 (1993) ("[t]he licensee's virtual absence of recruitment records demonstrates its lack of commitment to or interest in EEO efforts or self-assessment until the end of the license term. Such records are essential for adequate self-assessment").

g. Claims that one minority or female hire, job offer or job application proves that the licensee did not discriminate against other minorities or women

It is unfortunate that some broadcasters still practice "tokenism" -- e.g., the hiring of one minority or woman not because she has merit as an employee, but as license renewal insurance. It is even more unfortunate that the Commission has tolerated this practice.345/ Indeed, the Commission has even allowed licensees to rebut the inference of discrimination when they claim that they offered a job to a minority who didn't take the job.346/ In one infamous case, the Commission even invoked the fact that a licensee hadn't terminated minorities. There were no terminations because no minorities had been hired in the first place.347/

345/ See, e.g., Radio Chattanooga, 7 FCC Rcd 2929, 2930-31 ¶14 (1992), recon. denied, 10 FCC Rcd 9773 (1995) ("Radio Chattanooga") ("the licensee made some efforts to fulfill its EEO obligations" and "consistently employed at least one Black in a full-time position throughout the license term.")

346/ See Beacon Broadcasting Corporation, 9 FCC Rcd 2132, 2136-37 ¶¶27-35 (1994), recon. denied, Eagle Broadcasting Company, Inc., 11 FCC Rcd 7380 (1996) ("Beacon") (the station failed to use the two minority sources its 1986 assignment applications promised to use; it kept virtually no EEO records, but its license was saved by one minority hire and two offers to hire. The "minority" who was hired was not even reported as Hispanic until after the Petition to Deny was filed, and both of the "offers to hire" were unverified).

347/ "Unlike [Beaumont NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988) ("Beaumont")], in which designation for an evidentiary hearing was required, the record of WLVU/WLVU-FM does not suggest a sudden simultaneous departure of minority employees[.]" Miami, 5 FCC Rcd at 4898 ¶41.

An "offer to hire" is unverifiable and may not be genuine: the minority or woman who turned down the job may have deemed the offer an insult, or may have been someone the licensee already knew wouldn't take the job.348/ Evidence of these "offers to hire" are seldom accompanied with evidence showing how many White males were also offered the job and did not accept.

An even worse Commission practice is giving credit to a licensee for the mere fact that an unsuspecting minority walks off the street and fills out a job application (and isn't offered a job or hired).349/

If a single employee, purported job offer, interview, or even application can save a license, the EEO Rule doesn't amount to much. A licensee would have to refuse even to talk to a minority applicant before the Commission would designate its renewal application for hearing.

348/ In one case with which undersigned counsel is familiar, a radio station offered a night announcer's job to a Black man who was the lead anchor on the leading television station's nightly newscast. It then used this "offer" as evidence of lack of discriminatory intent. In another instance, a broadcaster offered a job to a woman who had just informed the broadcaster that she had accepted another job earlier the same day.

349/ See, e.g., Columbus, Ohio Renewals, 7 FCC Rcd 6355, 6359 ¶25 (1992) (on reconsideration) ("Columbus Renewals") ("although the licensee did not hire minorities during the time it was not subject to reporting conditions, its efforts attracted several minority applicants. We, therefore, find no evidence that the licensee engages in discrimination.")

Tokenism is an affront to the EEO Rule because it undercuts the principle that a person's civil rights are personal to him or her. One's civil rights cannot be advanced by the fact that someone else is treated fairly.[350] See, e.g., EEOC v. New York Times Broadcasting Service, Inc., 542 F.2d 34, 358 (6th Cir. 1976) (finding discrimination where employer argued that it already had a female employee and therefore didn't need to hire another).

The Commission's treatment of tokenism is perhaps the only area of its EEO jurisprudence in which some of the Commission's decisions cannot be reconciled with others.[351] Radio Chattanooga, Beacon, Miami and Columbus Renewals are directly contradicted by the Commission's unequivocal rejections of tokenism in Louisiana Renewals, 7 FCC Rcd 1503, 1508 ¶38 (1992), recon. denied, 8 FCC Rcd

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350/ If one's civil rights could be effectuated by token fair treatment of someone else, a hotel with 100 Black tourists standing in line could set aside all of its rooms to Whites except one. Cf. Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964). A school district which provides no English instruction for 1800 Chinese children would be immunized because it provided such instructions for a thousand others. See Lau v. Nichols, 414 U.S. 563, 564 (1974). A municipality would be excused from excluding Blacks from its boundaries because a few Blacks still reside within its boundaries or a few Whites still live without its boundaries. See Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960). Most Blacks could be excluded from a grand jury because some were included. Mitchell v. Rose, 570 F.2d 129, 133 (6th Cir. 1978).

351/ In order to prepare these Comments, we reviewed every reported FCC EEO decision since 1968. While we obviously do not agree with many of these decisions, they were generally consistent with each other -- except in this area. The Commission's treatment of tokenism was the only area of the Commission's EEO jurisprudence in which no clear pattern or direction of the cases could be determined.

3239 (1993) ("Louisiana"),[352] Kansas City Youth for Christ, Inc., 3 FCC Rcd 6866, 6868 ¶13 (1988) ("Kansas City"),[353] or Communications Fund, Inc., 7 FCC Rcd 8636, 8639 n. 15 (1992) ("Communications Fund").[354]

In his partial dissent in Bilingual II, Judge Robinson explained why tokenism in broadcast EEO is unacceptable:

> [T]okenism and other attempts to hide discriminatory designs are no more commendable than overt prejudice. Racism and sexism assume many forms, and a complete bar to employment is but one of them. Statistically-significant underrepresentation can be the result of purposeful discrimination as much as can absolute exclusion. For instance, race or sex may simply be one factor in an employment decision - as for an employer who hires only exceptional black applicants - but the prohibited animus is still there. (fns. omitted).

Id., 595 F.2d at 653. See also BBC, 556 F.2d at 64 n. 21 ("the fact that WTVR has hired some women and minority workers cannot shield WTVR's affirmative action efforts from scrutiny" where a "hopeful, but erratic and equivocal, statistical record" is present).

352/ "The mere presence of two or three Blacks on the stations' staffs of 25, 26 and 22 employees from 1986-1989, respectively, also does not excuse the licensee's lack of a program and lack of self-assessment. We pointedly reject the argument that the mere presence of a small number of minority employees who are holdovers from a previous licensee proves that the current licensee is engaged in successful minority outreach efforts. In fact, the presence of such employees offers no evidence whatsoever of affirmative action efforts by the current licensee." Id.

353/ The Commission held that since the licensee made no efforts to attract minorities, "the licensee's employment of minorities at all appears to be purely happenstance." Id.

354/ "The fact that a station has hired one minority, in and of itself, does not mean that it has an effective EEO program." Id.

The Commission should take the opportunity provided by this proceeding to make a clear and unequivocal statement that in the future, it will follow its own lead in Louisiana, Kansas City and Communications Fund, and condemn tokenism in every form.

B. In applying its Zero Tolerance Policy, the Commission should reject good faith but nonmeritorious defenses for EEO nonperformance

In this section, we discuss arguments filed by broadcasters in renewal applications and related papers which are without merit but which are usually not pretexts for discrimination. We do not advocate the drawing of adverse inferences from the simple fact that these arguments were advanced. Instead, we urge the Commission, as part of its Zero Tolerance Policy, to state or restate that the arguments have no merit.

1. Claims that a station's small size, or location in a small market, in and of itself makes EEO compliance difficult

The Tennessee Study found that staff size and market size are not correlated with EEO performance. See p. 52 supra. Nonetheless, we are unwilling to recommend that a station's contention that it is small, or in a small market, is indicative of discriminatory intent. This NPRM may have unintentionally fed that erroneous belief. Broadcasters cannot be faulted for making an argument which the Commission may have encouraged.

2. Claims that the licensee's own race, gender, civic good deeds, program service, past broadcast record, or life experience immunizes him or her from charges of EEO noncompliance

On several occasions, licensees have argued that their broadcast record or nonbroadcast personal attributes or deeds mitigate a poor EEO compliance record. These contentions are not evidence of discriminatory intent; instead, they are most often attributable to the desire of anyone facing a legal challenge to reaffirm one's pride and self-esteem.

Nonetheless, the Commission should gently reject these contentions on the merits. Liberal social views or editorial positions, charitable donations or other good deeds provide no succor to one who lost an opportunity for gainful employment. See p. 279 supra. Religious beliefs or deeds cannot be considered without falling afoul of the Establishment Clause. Family life is a private matter which is not the government's business.355/

355/ Loving v. Virginia, 388 U.S. 1 (1967).

C. The Commission should modernize the "Zone of Reasonableness"

1. The Commission should upgrade the "zone of reasonableness" to 80% of parity for minority and female employment in management and in the top four categories

Set out in Table 8 are our proposed revisions to the "zone of reasonableness.

TABLE 8

EEO SUPPORTERS' PROPOSED REVISIONS TO THE "ZONE OF REASONABLENESS"

Employee Category	Current Zone	Proposed New Zones
Management	No zones	80% of parity for Form 395 employment; 100% of parity for composition of applicant pool; 100% of parity for hiring rate
Top Four Categories	50% of parity for Form 395 employment	80% of parity for Form 395 employment; 100% of parity for composition of applicant pool; 100% of parity for hiring rate
Total Fulltime	50% of parity for Form 395 employment	No zones, but data should be reported since the lower five categories are a source of persons who can be promoted to the top four categories
Parttimers	No zones	No zones, but data should be reported since the lower five categories are a source of persons who can be promoted to the top four categories.

The "zone of reasonableness" is expected to contract over time in order to help move the industry toward the ultimate goal of full equality of opportunity.[356/] However, the "zone" has not changed in sixteen years.[357/] This has created the misimpression among many broadcasters that the zone of reasonableness is a floor above which compliance is assumed. This misimpression has some validity, because the Commission staff seldom conducts a serious EEO review of a broadcaster operating above 50% of parity.[358/]

356/ In Mission Central Co., 56 FCC2d 581, 586 (1975) ("Mission Central"), the Commission declared that "[t]he zone of reasonableness is a dynamic concept, which contracts as licensees are given time in which to implement our antidiscrimination rules and policies. Therefore, a percentage of minority employment that once was held to fall within a zone of reasonableness, in light of the licensee's affirmative action program, might not still be contained in a contracted zone of reasonableness as interpreted three years later." See also Nondiscrimination - 1976, 60 FCC2d at 229. The courts soon agreed, stating that "the Commission can be expected" to adopt a more stringent view of the acceptable zone over time. National Organization of Women v. FCC, 555 F.2d 1012, 1018 (D.C. Cir. 1977) ("NOW"); Los Angeles Women's Coalition for Better Broadcasting v. FCC, 584 F.2d 1089 (D.C. Cir. 1978) ("Los Angeles Women's Coalition"); Bilingual II, 595 F.2d at 629 n. 32.

357/ Indeed, it has not grown since the issuance of EEO Processing Guidelines, 46 RR2d 1693, clarified, 47 RR2d 438 (1980).

358/ In 1987, the Commission announced that it will review the EEO performance of licensees, even though they might operate above the statistical processing criteria, if their EEO programs are deficient. Broadcast EEO - 1987, 2 FCC Rcd at 3967, 3974 ¶50. See also D.W.S., Inc., 7 FCC Rcd 7170, 7172 n. 8 (1992) ("meeting or exceeding the guideline is not a 'safe harbor' and neither exempts the licensee's program from review by the Commission nor permits it to slacken or cease its recruitment efforts.")

As the nation's tolerance level for discrimination decreases, and as broadcasters learn how to comply with the EEO Rule, the zone of reasonableness must move toward levels manifesting full equal opportunity. Presently, the zone is so low that a station operating at that level is quite likely to be discriminating.359/

The 80% figures we have recommended in Table 8 originated with the late Commissioner Robert E. Lee, who informally proposed this figure in 1977 (albeit as a "safe harbor"; see pp. 204-207 supra), and from the U.S. Commission on Civil Rights, which also proposed it that year (but not as a "safe harbor"). U.S. Commission on Civil Rights, Window Dressing on the Set: Women and Minorities in Television (1977) ("Window Dressing"), p. 151.

359/ Castaneda v. Partida, 430 U.S. 482, 495 (1977) (figures showing 50% of parity indicate "substantial under-representation.") See also Alfred C. Frawley, "Revised Expectations: A Look at the FCC's Equal Employment Opportunity Policies," 32 Fed. Comm. Law J. 291, 305 n. 66 (1980) ("Frawley") (noting that at 25% of parity, "[i]f the broadcaster were subject to Title VII, such a performance would constitute a prima facie case of unlawful employment discrimination....The FCC nearly conclusively presumes that performance at specific, although depressed, threshold levels demonstrates EEO compliance and does not inquire further. The same figures, if presented in a charge to the EEOC or an implementing federal or state executive agency, could raise material questions about the broadcaster's compliance with the law.") Frawley adds that a very low zone of reasonableness, by creating "little incentive, aside from [the broadcaster's] own commitment to equal employment goals, to hire women or minority persons above the government-sanctioned levels," "contribute[s] to perpetuating employment levels far below the groups' distribution either in the population or the relevant workforce." Id. at 306. See also Nolan A. Bowie and John W. Whitehead, "The Federal Communications Commission's Equal Employment Opportunity Regulation - An Agency in Search of a Standard," 5 Black Law Journal 313, 314 (1977) (finding that EEO requirements were "vague, variable, evasive and easily met, even by broadcasters who actively discriminate" and that FCC regulations fell well below Title VII standards).

We have recommended a zone of reasonableness for management employees, replacing the test for total fulltime employees.360/ The total fulltime employees test adds no information to the test for the top four categories except for the inclusion of bottom five category employees (e.g., secretaries and janitors). There is no need for an EEO enforcement program to enable women and minorites to become broadcast secretaries and janitors. See pp. 38 supra. Thus, it is a waste of time and effort to continue to have a total fulltime employment zone of reasonableness.

On the other hand, a zone for management employees would be very useful. These are the persons most able to contribute to the diversity of information which is a primary goal of the EEO Rule. See pp. 16-20 supra.

Finally, we have recommended a zone of reasonableness for applicant flow and hiring. It is virtually impossible for a station to reach employment parity unless its applicant pool composition hiring rate is at least 100% of parity. See Tennessee

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360/ This proposal was first made in NOW, 555 F.2d at 1018-19.

Study, Exhibit 1, which used these variables to generate statewide data.361/

361/ The Tennessee Study found that "[i]f the Commission shifts its enforcement emphasis from fulltime jobs to top four category jobs, it will need to expand the reporting period (e.g. from one year to four years) in order to obtain the same volume of hiring data on top four category employment which it now obtains for fulltime employment. This follows from our observations of job turnover rates, which showed that turnover was far more commonplace in the bottom five categories than in the top four categories. While 32% of the stations filing Form 396 reported no top four category hires during the reporting year, only 8% reported no fulltime hires during the reporting year. The median number of top four category hires was three. However, the median number of fulltime hires was six, even though the vast majority of all employees work in the top four categories, as shown by the fact that the median number of top four category employees was eleven and the median number of fulltime employees was twelve. The majority of the stations' top four category job turnover rates were rather low, with 62% of the stations turning over less than 25% of the number of employees they reported in the top four categories, although 38% of the stations turned over less than 25% of the number of fulltime employees they reported. The median percentage of top four category staff which turned over was 9% and the median percentage of fulltime staff which turned over was 33%. See pp. 48-49 supra.